

## **“Buyback” Restriction**

The following document is the full text of the County of Kauai's Restriction on Sale or Transfer, and Use as contained in the Kauai County Code. For a 10-year period of time, this restriction gives the County the right to buy back any property subject to this restriction at a sales price equal to the cost an owner has invested into the property, plus interest, if the owner wants to sell the property or does not reside at the property. Value of the property is not considered. Whenever a property is repurchased, the County resells the property at the same price, plus expenses, to another eligible Kauai household, thus maintaining one more affordable housing unit for Kauai. This restriction is attached to the deed of any residential property sold or financed by the County, or houses that were sold as affordable housing and were otherwise assisted by the County.

### **RESTRICTIONS ON SALE OR TRANSFER, AND USE Section 2-1.16, Kauai County Code 1987**

#### **(f) Real Property; General Provisions of Restrictions on Sale or Transfer, and Use.**

(1) Title and Purpose. The County shall implement an anti-speculative buy-back provision that shall be known as the "Restrictions on Sale or Transfer, and Use." These restrictions shall apply to the sale or transfer of any real property and apply to the use of any real property acquired, financed, developed, constructed, or sold by the County pursuant to this Section and which are sold on the condition that the purchaser accepts the restrictions on the sale or transfer, and use in the real property purchased. The restrictions shall also apply to privately developed real property that is sold to satisfy an affordable housing requirement and which, by mutual agreement between the County and the private developer, requires that such sales be subject to the County's Restrictions on Sale or Transfer, and Use.

(2) Relevance to State Law. The restrictions on sale or transfer, and use are in a form substantially equivalent to the provisions of Sections 201E-221, 222, and 223, Hawaii Revised Statutes. These restrictions on sale or transfer, and use clarify the intent of various provisions of State law and utilize provisions that are in some cases more stringent.

(3) Severalty. If any part of this Subsection is declared by the Court to be invalid, the same shall not affect the validity of the Subsection as a whole, or any part thereof other than the part so declared invalid.

(4) Duration of Restrictions. Where the restrictions on sale or transfer, and use of property apply for a period of time, the period of time shall not be increased beyond the date calculated from the date of original purchase without the mutual consent of the owner and the Kauai County Housing Agency (KCHA). The subsequent sale of any real property repurchased by the County pursuant to Subsection (g), shall incorporate the restrictions on sale or transfer, and use and shall apply for the same period of time as an original purchase. The period of time that the restrictions on sale or transfer, and use shall apply is as follows:

(A) For real property acquired, financed, developed, constructed, or sold by the County through the KCHA, the restrictions shall apply for a period of ten (10) years during which the dwelling unit is occupied by the owner, and

(B) For real property sold by a private developer satisfying an affordable housing requirement that by mutual agreement between the County and the private developer is subject to these restrictions, the restrictions may apply for a period of less than the ten (10) year occupancy period, with the time period of the restriction established either pursuant to adopted policy guidelines or written agreement between the developer and the County.

(5) Modification of Restrictions. No real property owner shall be entitled to modify the restrictions on sale or transfer, and use of the real property, without the written permission of the holder of a duly-recorded first mortgage on the real property and the owner of the fee simple or leasehold interest in the land, unless the holder of the first mortgage or the owner is the County.

(6) Uniformity of Restrictions. Restrictions on sale or transfer, and use of real property shall be made as uniform as possible in application and restrictions shall be conformed with agreement of the owner to reflect change or repeal made by any subsequent ordinance, rule or regulation. Real property owners shall be permitted at their election to sell or transfer real property subject to restrictions in effect at the time of their sale or transfer.

(7) Public Notice of Amendment to Restrictions. The KCHA shall notify owners of any substantial change in restrictions made by ordinance, rule or regulation not more than one hundred eighty days after a change in restrictions, and such notice shall clearly state the enacted or proposed new provisions, the date or dates upon which they are to be effective, and offer to each owner of real property sold prior to such effective date an opportunity to modify the existing contract or other instrument to incorporate the most recent provisions. The notice shall be published at least three times in a newspaper of general circulation in a County newspaper.

(8) Market-Oriented Real Property. The restrictions on sale or transfer, and use shall not apply to market-priced real property in an economically integrated housing project.

(9) Waiver to Comply to Federal Law Or Regulation. The KCHA shall be authorized to waive any of the restrictions on sale or transfer, and use in order to comply with or conform to requirements set forth in federal laws or regulations governing mortgage insurance or guarantee programs or requirements set forth by federally chartered secondary mortgage market participants. For the purposes of these restrictions, the United States Department of Housing and Urban Development shall be defined as and considered a mortgage holder.

(10) Release of Repurchase Right and Occupancy Requirement. If the real property is financed under a federally subsidized mortgage program and these restrictions would jeopardize the federal government's ability to recapture any interest credit subsidies that were provided to the owner; or if the real property is in poor condition and the resale of the property, with or without repairs and rehabilitation to correct deficiencies, may be construed to expose the County to an unacceptable amount of economic or liability risk; or if the calculated repurchase price of the real property is comparable to or above the unrestricted market value of the property, the County may decline its first option to purchase the real property subject to the restrictions on sale or transfer, and use; and the owner may then transfer the real property to any subsequent owner or transferee, without buyer, price, or occupancy restriction, and the restrictions on sale or transfer, and use, shall be automatically extinguished and shall not attach in subsequent transfers of title, provided that:

(A) The County will decline its first option to purchase for a period of time not to exceed one (1) year, during which time of the release, the real property owner must sell or transfer title; and

(B) Upon the sale or transfer of the real property, the owner shall be required to pay any amount owing the County, including any mortgage note or other loan, any subsidy or deferred sales price, interest on any amount owing, and the County's share of any net appreciation pursuant to the County's Shared Appreciation Program, if applicable.

(11) Mortgage Consents. The Executive on Housing shall consent to mortgages and liens on the property for the purpose of financing, re-financing, purchase of the fee simple title, repayment of a subsidy or deferred sales price, payment of the County's share of appreciation for real property subject to the County's Shared Appreciation Program, construction of essential or modest capital improvements, or catastrophic household medical expenditures of an emergency or life-threatening nature, provided the total principal balance of all mortgages and liens does not exceed the amount prescribed by Subsection (g)(1)(A). However, in the case of re-financing a federally subsidized mortgage, the Executive on Housing shall consent to the re-finance of a loan in excess to the amount prescribed by Subsection (g)(1)(A) and up to a total amount that does not exceed the principal balance of all mortgages and liens that have obtained the County's prior consent and accrued interest credit subsidy. In addition, the Executive on Housing may consent to mortgages or liens in excess of the amount prescribed by Subsection (g)(1)(A) that are created solely for the purpose of enabling the owner to add capital improvements to the real property that are essential or modest and which shall proportionately increase the amount prescribed in Subsection (g)(1)(A) when completed.

(12) The County's interest created by the provisions of these restrictions shall constitute a lien on the real property and shall be superior to any other mortgage or lien, except those mortgages or liens:

- (A) Created solely for the purchase of the real property;
- (B) Insured or held by a federal housing agency; or
- (C) Created with the written consent of the County.

(13) Subsidy or Deferred Sales Price. In any sale by the County of real property for which a subsidy or deferred sales price was made by the County, as described in Subsection (g)(1)(C)(ii), the amount, a description of the cost items, and the conditions of the subsidy or deferred sales price shall be clearly stated at the beginning of the contract document issued by the County.

(14) Application of Restrictions. The provisions of Subsections 2-1.16(f), (g) and (h), herein shall be incorporated in any deed, lease, agreement of sale, or other instrument of conveyance, rule or regulation relating to restrictions on sale or transfer, and use of real property purchased from the County through its KCHA or real property privately developed and sold to satisfy an affordable housing requirement and, by mutual agreement between the County and the private developer, is subject to these restrictions.

**(g) Real Property; Restrictions on Sale or Transfer, Waiver of Restrictions.**

(1) Restrictions on Sale or Transfer. The following restrictions shall apply to the sale or transfer of any real property purchased through the KCHA from the County or real property privately developed and sold to satisfy an affordable housing requirement and, by mutual agreement between the County and the private developer, is subject to these restrictions whether on fee simple or leasehold property.

(A) For a period of ten years after the purchase of a dwelling unit, during the five-year construction period after the purchase of a vacant lot, and for a period of ten years from the occupancy of a dwelling unit constructed by or for the owner on a vacant lot, whether ownership of the dwelling unit or vacant lot is from an original or subsequent purchase, and whether by lease, assignment of lease, deed, or agreement of sale, if the owner wishes to sell or to transfer title to the real property or the lease, the County shall have the first option to purchase the real property or lease at a price which shall not exceed the sum of:

(i) The original cost to the owner;

(ii) The cost of any capital improvements added by the owner, provided that for a vacant lot owner, the cost of a dwelling unit constructed by an owner-builder, including a participant in a County sponsored self-help housing project, shall be the initial building assessment value determined by the County's Real Property Tax Division, Department of Finance or the total documented cost of construction, whichever is greater; and

(iii) Simple interest on the original cost to the owner and the cost of capital improvements added to the property by the owner at the rate of one percent a year.

(B) The County may purchase the unit either free and clear of all mortgages and liens or subject to existing mortgages and liens.

(i) If the real property is conveyed free and clear of all mortgages and liens, it shall be conveyed to the County only after all mortgages and liens are released.

(ii) If the real property is conveyed subject to existing mortgages and liens, the County shall assume the seller's obligation on any first mortgage created for the sole purpose of purchasing the real property and for any other mortgage or lien that the County has consented to in writing. The amount paid by the County to the seller shall be the difference, if any, between the purchase price determined by the provisions in Subsection (g)(1)(A) and the total of the outstanding principal balances of the mortgages and liens assumed by the County.

(iii) If the real property is financed under a federally subsidized mortgage program, in lieu of the release of these restrictions pursuant to Subsection (f)(10), the County, at its sole option, may purchase the property for a sum in excess of the amounts prescribed in Subsection (g)(1)(A) and equal to the sum of mortgagee's principal balance plus accrued interest credit subsidy.

(C) After the end of the tenth year from the date of purchase, or execution of an agreement of sale, the owner may sell the real property or assign the property to any person or firm free from any price restrictions; provided that the owner shall be required to pay to the County the sum of:

(i) The balance of any mortgage note, agreement of sale, or other amount owing to the County, including the County's share of any net appreciation on real property subject to the County's Shared Appreciation Program, if applicable;

(ii) Any subsidy or deferred sales price made by the County in the acquisition, financing, development, construction, and sale of real property, and any other amount expended by the County not counted as cost in the original sales price but charged to the real property by good accounting practice as determined by the KCHA whose books shall be prima facie evidence of the correctness of the costs; and

(iii) Interest on the subsidy and any other amount expended at the rate of seven percent a year computed as to the subsidy or deferred sales price, from the date of purchase, or execution of the agreement of sale, and as to any amount expended, from the date of expenditure; provided that the computed interest shall not extend beyond thirty years from the date of purchase, or execution of agreement of sale, of the property; and provided that if any proposed sale or transfer will not generate an amount sufficient to pay the County the sum computed under this paragraph the County shall have the first option to purchase the real property at a price which shall not exceed the sum as computed under Subsection (g)(1)(A).

(D) Notwithstanding any provision above to the contrary, pursuant to rules adopted by the KCHA, the subsidy or deferred sales price described in Subsections (g)(1)(C)(ii) and any interest accrued pursuant to Subsection (g)(1)(C)(iii) may be paid at any time.

(2) Waiver of Restrictions. The restrictions prescribed in Subsection (g)(1) may be waived by the Executive on Housing if:

(A) The owner wishes to transfer title to the real property or lease by devise or through the laws of descent to an immediate family member who would otherwise qualify under rules established by the KCHA and who accept the restrictions on sale or transfer, and use, which shall be reinstated with the effective date of the original purchase, and provided that the immediate family member accept reinstatement of the County's Shared Appreciation Program, if applicable; or

(B) The sale or transfer of the real property would be at a price and upon terms that preserve the anti-speculative intent of these restrictions without the necessity of the County to repurchase the real property and that the sale or transfer is to a subsequent owner or transferee determined eligible by the KCHA, provided that the subsequent owner or transferee accept the restrictions on sale or transfer, and use, which shall be reinstated as of the new effective date of the subsequent purchase, and further provided that the subsequent owner or transferee accept reinstatement of the County's Shared Appreciation Program, if applicable.

(3) Foreclosure of Real Property.

(A) The restrictions on sale or transfer, and use shall be automatically extinguished and shall not attach in subsequent transfers of title when a mortgagee or other party becomes the owner of the real property or leasehold interest pursuant to a mortgage foreclosure, foreclosure under power of sale, or a conveyance in lieu of foreclosure after a foreclosure action is commenced or when a

mortgage is assigned to a federal housing agency. Any law to the contrary notwithstanding, a mortgagee under a mortgage covering title or leasehold interest of real property encumbered by the first option to purchase in favor of the County, prior to commencing mortgage foreclosure proceedings, shall notify the County in writing of:

(i) Any default of the mortgagor under the mortgage within ninety days after the occurrence of the default, and

(ii) Any intention of the mortgagee to foreclose the mortgage under Chapter 667, Hawaii Revised Statutes, provided that the mortgagee's failure to provide such written notice to the KCHA shall not affect such holder's rights under the mortgage.

(B) The County shall be a party to any foreclosure action, and shall be entitled to all proceeds remaining in excess of all customary and actual costs and expenses of transfer pursuant to default, including liens and encumbrances of record; provided that the person in default shall be entitled to an amount which shall not exceed the sum of amounts determined pursuant to Subsection (g)(1)(A) less any amounts determined to be customary and actual costs and expenses of transfer pursuant to default.

#### **(h) Real Property; Restrictions on Use.**

(1) **Occupancy Requirements.** Real property purchased from the County through its KCHA or real property privately developed and sold to satisfy an affordable housing requirement and, by mutual agreement between the County and the private developer, is subject to these restrictions requires that the dwelling unit shall be occupied by the owner at all times during the applicable restriction period, except in a hardship circumstance where a temporary occupancy waiver is provided by the Executive on Housing or occupancy is temporarily suspended as a result of a natural disaster that renders the dwelling unit non-habitable.

(A) Dwelling units purchased from the County begin the ten-year restriction period from the date of purchase; and

(B) Vacant lots purchased from the County require the owner to build or have built a dwelling unit on the vacant lot and that the dwelling unit shall be completed and shall be occupied by the owner within five years from the date of purchase of the vacant lot. Upon occupancy of the completed dwelling unit, the ten-year restrictions on sale or transfer, Subsection (g), and the applicable ten-year restrictions on use, Subsection (h), shall begin.

(2) **Verification of Occupancy.** From time to time the KCHA may submit a verification of owner-occupancy form to the owner during the restriction period. Failure to respond to the verification in a timely manner or violation of Subsection (h)(1) shall be sufficient reason for the County, at its option, to purchase the real property as provided by Subsection (g)(1)(A).

(3) **Release of Repurchase Right or Foreclosure of Real Property.** The restrictions prescribed in Subsection (h)(1) shall be automatically extinguished and shall not attach in subsequent transfers of title as prescribed in Subsection (g)(3) or Subsection (g)(4).

(4) **Waiver of Restrictions.** The restrictions prescribed in Subsection (h)(1) may be temporarily waived by the Executive on Housing for a period of time up to one (1) year for a hardship circumstance, during which time the dwelling unit may be rented or leased, provided that:

(A) The hardship circumstance is an unforeseeable job or military transfer, a temporary educational sabbatical, a serious illness of the owner or a member of the owner's household, or such other hardship circumstance as determined by the KCHA on a case by case basis;

(B) The waiver may be granted only to qualified residents who have paid resident State income taxes during all years in which they occupied the dwelling and who shall continue to pay resident State income taxes during the waiver period;

(C) The term of the Restriction on Sale or Transfer, and Use shall be extended by one day for each day that the owner occupancy requirement is waived;

(D) The term of the waiver may be extended or other waivers may be approved at other time periods provided the total occupancy waiver period may not exceed ten (10) years.

(E) The County may recover all relevant administrative expenses and attorney's fees from the owner; and

(F) Failure to re-occupy the dwelling unit by the owner at the end of the temporary waiver period shall be sufficient reason for the County, at its option, to purchase the real property as provided in Subsection (g)(1)(A).